SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-321

DREWRYS LIMITED U. S. A., INC. AND LOCAL UNION NO. 275, INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS OF AMERICA, AFL-CIO,

Petitioners,

vs.

ANN BARTMESS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Petitioners,

vs.

ANN BARTMESS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on July 7, 1971.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals is not yet reported in the official reports but is printed in Appendix A hereto, *infra*. The opinion of the Court of Appeals reversed an order of the District Court for the Northern District of Indiana, South Bend Division which dismissed Respondent's complaint for lack of subject matter jurisdiction. The order of the district court, dismissing Respondent's complaint is not officially reported; the material part of the order as reflected by the record is printed in Appendix A hereto, *infra*.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on July 7, 1971. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

STATUTES AND FEDERAL GUIDELINE.

The statutes involved are: Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e et seq., the relevant provisions being Sections 2000e-2(a) and (c), 2000e-5(a), (d) and (e) and 2000e-12(b); the Administrative Procedure Act, 5 U. S. C. § 706(2)(a). Because these provisions are lengthy, their pertinent text is set forth as Appendix B hereto, *infra*.

The federal guideline involved is the Equal Employment Opportunity Commission's (hereinafter referred to as EEOC) *Guidelines on Discrimination Because of Sex*, Section 1604.31(a) and (b), as amended February 21, 1968, 29 C. F. R. § 1604.31(a) and (b). The material text of Guideline is printed in Appendix C hereto, *infra*.

QUESTIONS PRESENTED.

The questions presented herein arise under Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e et seq., and raise vitally important issues anent district court jurisdiction over Title VII actions and the application of Title VII to private retirement plans.

They represent questions which have not been settled by this Court and whose resolution will have a far reaching financial impact upon not only the instant Petitioners but upon all other companies and unions which have negotiated

retirement plans that differentiate between men and women with respect to retirement age.

The questions presented are:

1. Whether the decision of the Court below is in conflict with the jurisdictional filing prerequisite of Section 706(d) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-5(d), which provides that "a charge * * * shall be filed [with the EEOC] within ninety days *after* the alleged unlawful employment practice occurred * * *." (Emphasis added.) The district court found it was without jurisdiction over the Respondent's suit because she had failed to timely file a written charge with the EEOC as is required by Section 706(d) of Title VII; the Respondent filed her charge more than four months before the occurrence of the alleged isolated unlawful employment practice complained of in the district court, *i.e.*, her compulsory retirement at age sixty-two. The Court below reversed the district court and held that the Respondent had timely invoked the administrative process of the Civil Rights Act, as required by Section 706(d).

2. Whether the unlawful employment practice alleged in Respondent's charge with the EEOC is in fatal variance with the allegations contained in Respondent's complaint. The district court found a fatal variance existed between the charge and the complaint and accordingly determined it was without jurisdiction to hear Respondent's complaint. The Court below reversed the district court, finding no such variance to be present.

3. Whether the Respondent is an "aggrieved person" within the meaning of Section 706(a) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-5(a), raises two paramount questions:

(a) should the Respondent be estopped or heard to contest the legality of her retirement since her retirement was

effected pursuant to a collective bargaining agreement which she, through her own duly elected bargaining agent, the Petitioner Union, negotiated prior to the enactment of Title VII; and

(b) should the Respondent be deemed to have waived any rights to claim a loss as a result of the plan from which she derived and accepted benefits?

The decision of the Court below fails to treat and dispose of either of these two important questions; this oversight is surprising in view of the fact that the Court below posed questions bearing upon the issue of whether the Respondent should be heard to complain about an agreement which her own elected bargaining agent negotiated prior to the enactment of Title VII.

4. Whether it can be concluded that Congress intended Title VII to prohibit sex differentials in retirement plans notwithstanding the available legislative history and the statements of Senator Hubert Humphrey, Floor Manager of the Civil Rights Bill of 1964, that Title VII was not intended to impair existing retirement programs. The Court below answered the question affirmatively.

5. Is the Equal Employment Opportunity Commission's *Guideline on Discrimination Because of Sex*, as amended February 21, 1968, 29 C. F. R. 1604.31, arbitrary and capricious and should it have been given retroactive application as to some firms, unions and employees and not others? In addition to the serious question of selective and discriminatory retroactive application of the Guideline, there is an equally important question as to whether the Guideline should be applied retroactively or prospectively. The Court below held that the Guideline was not capricious notwithstanding its built-in grace period which had the effect of temporarily insulating certain companies and unions from charges alleging sex discrimination in their retirement

plans; the grace period necessarily afforded these select companies and unions an opportunity to adjust their retirement plans so as to comply with the Guideline's pronouncement that Title VII was intended to prohibit sex differentials in retirement plans. The Court below completely ignored the critical question of whether the Guideline should be given retroactive effect.

STATEMENT OF THE CASE.

The apposite facts and relevant proceedings in this case are not disputed and may be summarized in the following manner.

The Respondent was a former non-supervisory employee of the Petitioner Drewrys Limited U. S. A., Inc. and was a member of Petitioner Local Union No. 275, International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO.

During all periods of time relevant to this application, the Petitioner Union was the exclusive bargaining agent for the Respondent. Pursuant to a collective bargaining agreement negotiated by the Petitioners, a retirement plan was adopted and became effective on May 1, 1955 wherein it was agreed that female employees of the Petitioner Company were to retire at age sixty-two and male employees were to retire at age sixty-five. Like all other similarly situated employees and union members, Respondent was subject to the terms and conditions of the retirement program.

On February 16, 1967, approximately four and one-half months before Respondent's retirement, she filed an administrative charge with the EEOC; in essence, the charge alleged that the Petitioners were committing an unlawful employment practice in violation of Title VII of the Civil

Rights Act of 1964 by maintaining a retirement program which discriminated against her because of her sex.[1] On June 30, 1967, Respondent passed her sixty-second birthday and was retired pursuant to the terms and conditions of the retirement agreement.

On February 21, 1968, more than one year after Respondent filed her charge with the EEOC and approximately five and one-half months after her retirement, the EEOC issued Guideline Section 1604.31(a), *Guidelines on Discrimination Because of Sex*, as amended February 21, 1968, 29 C. F. R. § 1604.31(a), wherein the EEOC declared that "(a) a difference in optional or compulsory retirement ages based on sex violates Title VII [of the Civil Rights Act of 1964]."

Subsequently, on April 7, 1969, after serving notice of the charge on the Petitioners and after conducting an investigation of the charge, the EEOC rendered a decision on the charge; it ruled that there was reasonable cause to believe that the Petitioners were committing an unlawful employment practice in violation of Title VII by maintaining a retirement plan which discriminated against the Respondent because of her female sex.

Thereafter and pursuant to Section 706(a) of Title VII, 42 U. S. C. § 2000e-5(a), conciliatory efforts were undertaken and being unable to reach an agreement that was mutually satisfactory to the parties, the EEOC notified Respondent by suit letter dated October 23, 1969, that

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1. The EEOC's April 7, 1969 decision in this case gives an accurate capsulation of the import of Respondent's charge of February 16, 1967 and reads as follows:

> Charging Party alleges that [Petitioner] Respondent Employer and [Petitioner] Respondent Labor Organization have committed and are committing an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964 by maintaining a retirement plan which discriminates against her because of her sex (female).

pursuant to Section 706(e) of Title 42 U. S. C. § 2000e-5(e), she was entitled to institute a civil action in the district court on the basis of her administrative charge.

On November 20, 1969, the Respondent, by her attorney, filed her complaint in the district court. The complaint was bottomed on the Respondent's retirement which she alleged violated her civil rights under 42 U. S. C. § 2000e-2(a) and (c).

In response to the complaint the Petitioner Company and Petitioner Union respectively moved to dismiss and for summary judgment on the theory that the trial court lacked jurisdiction over the matter because the Respondent had failed to duly and timely file her written charge with the EEOC as required by Section 706(d) of Title VII, 42 U. S. C. § 2000e-5(d).

Subsequently, upon leave of the trial court, the Petitioners joined in an Amended Motion to Dismiss which alleged three distinct grounds upon which the action could be dismissed: 1) that the trial court did not have subject matter jurisdiction over Respondent's complaint because she had failed to comply with the jurisdictional filing requirements of Section 706(d) of Title VII, 42 U. S. C. § 2000e-5(d); 2) that Congress did not intend Title VII of the Civil Rights Act of 1964 to apply to retirement plans; and 3) that § 1604.31 of the EEOC's *Guidelines on Discrimination Because of Sex* is arbitrary and capricious and that the Guideline should not be applied retroactively to charges filed prior to the effective date of the Guideline.

The district court dismissed Respondent's complaint, and as noted in the opinion of the Court below, the trial court's dismissal was premised upon the finding that Respondent had failed to duly and timely file a written charge with the EEOC. In addition to the district court's finding that the Repondent had failed to invoke its jurisdiction because of

her failure to comply with the jurisdictional filing prerequisites of Section 706(d), the trial court also recognized that it did not acquire subject matter jurisdiction over the cause of action because the charge filed with the EEOC was in fatal variance with the complaint.

Respondent appealed the trial court's order of dismissal to the Court below. On July 7, 1971, the Court of Appeals, in an opinion by Senior Circuit Judge F. Ryan Duffy, reversed the dismissal order, specifically holding that the district court had jurisdiction over Respondent's suit, that Congress intended Title VII to encompass retirement plans, and that Section 1604.31 of the EEOC's Guideline is not arbitrary and capricious.

On July 28, 1971, Petitioners filed a motion to stay the issuance of the mandate, pending the filing of this petition for certiorari. The Court below, by order dated August 2, 1971 which was received by Petitioners on August 3, 1971, granted the Motion For Stay of Mandate for a period of thirty days.

REASONS FOR GRANTING WRIT.

The decision of the Court of Appeals below should be reviewed because it passed upon important threshold Title VII questions which have not been settled by this Court. The ultimate resolution of these key issues will have a far-reaching financial impact upon not only the Petitioners in the instant case but upon the host of other companies and unions which have negotiated retirement plans that differentiate between men and women with respect to retirement age.

Exemplifying the broad economic effect this decision may have upon similarly situated companies and unions are two recent telephone calls which the attorneys for Petitioners received from legal counsel for two very large,

nationally known employers. The attorneys for these two concerns indicated they were following this case with great interest since their respective clients maintained retirement plans similar to the one under review. Like the Petitioners, these firms face potential large back pay suits by employees who were retired pursuant to plans negotiated before the 1964 enactment of Title VII and before the EEOC's 1968 pronouncement that Title VII prohibited these plans. There are countless other companies and unions who maintained similar plans and for whom this decision will have substantial, if not disastrous, financial significance.

In addition, and aside from the issues of first impression, the decision of the Court below should be reviewed because it contains holdings which are arguably in conflict with the decisions of other Circuits and because it disregards express statutory mandates. Moreover, the decision of the Court below should be reviewed because it sidesteps and leaves undecided certain difficult and fundamental questions raised by the Petitioners; Petitioners submit that had the Court of Appeals considered these questions it would not have reversed the dismissal of the district court.

1. The reversal by the court below of the trial court's dismissal of Respondent's complaint makes a travesty of and is in conflict with Section 706(d) of Title VII, 42 U. S. C. § 2000e-5(d) which provides that a charge shall be filed within the EEOC within ninety days *after* the alleged unlawful employment practice occurred.

It is well settled that compliance with the ninety day filing mandate of Section 706(d) is a jurisdictional precondition to the commencement of a court action. See, *e.g., Choate* v. *Caterpillar Tractor Company*, 7th Cir., 402 F. 2d 357, 359 (1968); *Fore* v. *Southern Bell Tel. & Tel. Co.*, 293 F. Supp. 587, 588 (W. D. N. C., 1968) ("It is true that the statute [§ 706(d)] requires the person aggrieved

to file a written charge within 90 days; it says so clearly, and the courts so hold.")

By Paragraph 9 of the complaint, the Respondent acknowledges and admits that she filed her written charge with the EEOC "prior" to the termination of her employment on June 30, 1967.[2] Respondent's complaint is bottomed on and seeks redress for the single, isolated event of her compulsory retirement on June 30, 1967, an event which occurred after the filing of her charge with the EEOC. Unless the complained of event of her compulsory retirement is considered a continuing violation, Section 706(d) requires that Respondent must have filed her charge with the EEOC within ninety days *after* the occurrence of the alleged unlawful retirement.

Petitioners readily agree that in a case where there is a "continuing violation" alleged the ninety days filing mandate of Section 706(d) is suspended and not applicable. *E. g., Cox* v. *U. S. Gypsum Company*, 7th Cir., 409 F. 2d 286 (1969).

Under the salient facts of the instant case, Respondent's action is not insulated from dismissal under the "continuing violation" theory because her compulsory retirement, the event upon which the complaint is premised, was not a "continuing act" or a "continuing violation". Rather, the compulsory retirement was a completed act when effected and is in the nature of a layoff, a discriminatory

2. Paragraph 9 of the Respondent's complaint states that:

> On February 16, 1967, prior to the commencement of this action, and *prior to termination of her employment*, * * *, the [Respondent] plaintiff charged in writing under oath that [Petitioner] Drewrys and the [Petitioner] Union * * * were engaging in an unlawful employment practice in violation of Title VII of the Act alleging maintenance by [Petitioner] Drewrys and the [Petitioner] Union of a retirement plan which discriminates against her because of her female sex, which said written charges under oath were duly and timely filed with the Equal Employment Opportunity Commission as required by the Act. (Emphasis added.)

recall, a discontinuance of a work assignment or a transfer. Both the General Counsel for the EEOC and the courts have held that the aforementioned unfair employment practices do not constitute continuing violations. See, *Burney* v. *North American Rockwell Corp.*, 302 F. Supp. 86, 92 (C. D. Cal., 1969); *Hutchings* v. *United States Industries, Inc.*, 309 F. Supp. 691 (E. D. Tex., 1969); *Younger* v. *Glamorgan Pipe & Foundry Co.*, 310 F. Supp. 195 (D. W. Va., 1969); the General Counsel's Opinion Letters have ruled that a transfer is not continuing (Op. Lt., Dec. 2, 1965), that the discontinuance of a work assignment is not continuing (Op. Lt., Nov. 26, 1965), that a layoff or discriminatory recall is not continuing (Op. Lt., Jan. 11, 1966), CCH *Employment Practices Guide*, ¶ 1255.75, .78 and .80.

Because Respondent's compulsory retirement does not constitute a continuing violation, it is clear that she did not have standing to file a charge on the basis of her actual retirement until it occurred on June 30, 1967 and that the ninety days filing requirement of Section 706(d) is operative. To satisfy the jurisdictional prerequisite of Section 706(d), Respondent's complaint, which is premised on and seeks redress for her alleged unlawful retirement, must be founded on a charge which was filed within ninety days after the occurrence of her retirement.

Since Respondent's charge was filed more than four months before her retirement and not within ninety days *after* the alleged unlawful retirement, she failed to timely comply with the filing requirements of Section 706(d). Clearly, the district court properly dismissed the employee's action on the basis of lack of jurisdiction, and the Court of Appeals erred in reversing that decision.

2. Petitioners also submit that in addition to the jurisdictional bar created by Respondent's premature filing of the charge, there is yet another equally significant and con-

terminous jurisdictional barrier to Respondent's suit which the Court below failed to recognize.

Petitioners submit that the decision of the Court of Appeals is erroneous and in conflict with the weight of authority in that it fails to comprehend the fatal variance which exists between the charge filed with the EEOC and the complaint filed in the trial court.

The nature of the unfair employment practice set forth in Respondent's EEOC charge is substantially different and materially varies from the allegations contained in Respondent's complaint. The charge addresses itself solely to the alleged continuing Title VII violation of maintaining a retirement plan which differentiates between males and females with respect to retirement age. The complaint, on the other hand, is fundamentally premised upon and seeks redress for the alleged noncontinuous Title VII violation of Respondent's own actual retirement. Underpinning this variance is the fact the charge and the complaint invoke wholly different remedial considerations. Respondent's charge before the EEOC attacks the general validity of an allegedly discriminatory retirement plan and inferentially prays for injunctive relief while the complaint in the district court seeks individual redress in the form of monetary remuneration and personal indemnification.

Where, as here, the allegations of the complaint do not fall within the scope of the charge, it is uniformly held that the trial court is without subject matter jurisdiction. *Mickel* v. *South Carolina State Employment Service*, 4th Cir., 377 F. 2d 239, *cert. denied*, 389 U. S. 877, 88 S. Ct. 177, 19 L. Ed. 2d 166 (1967); *Edwards* v. *North American Rockwell Corp.*, 291 F. Supp. 199, 203-04 (C[illegible] Cal., 1968); *Allen* v. *Lockheed-Georgia Company*, 61 L. C. ¶ 9183 (N. D. Ga., 1968).

Respondent's retirement occurred after she filed her

EEOC charge. Thus, the very premise of Respondent's complaint was not and could not have been included in her charge to the EEOC and as stated in *Edwards* v. *North American Rockwell Corp.*, *supra* at 203:

> Any allegations in the complaint referring to matters occurring *after* the filing of a charge must necessarily be considered as allegations concerning which no charge has been filed for purposes of this Court's subject matter jurisdiction. (Emphasis added.)

The effect of the reversal of the trial court by the Court below is to permit a material variance between the nature of the charge and the complaint and to allow the charge and the complaint to invoke wholly different remedial considerations. To so condone the commencement of a civil suit founded upon allegations not contained in the charge is to invite an allegedly aggrieved person to bypass the filing requirement of Section 706(d) and to avoid the conciliation efforts of the EEOC, as provided for under Section 706(a), 42 U. S. C. § 2000e-5(a). This Court should now speak out to restore the sanctity of these statutory provisions and to protect the statutory scheme Congress established to resolve alleged Title VII violations.

3. The decision of the Court below completely ignores and sidesteps the difficult but equitably based question of whether the Respondent should be estopped and not heard to complain that she is an "aggrieved person" within the meaning of Section 706(a) of Title VII, 42 U. S. C. § 2000e-5(a).

Petitioners urged by brief and on oral argument in the Court below that Respondent should not be heard to contest her retirement since it was effected pursuant to a collective bargaining agreement which was adopted several years be-

fore the enactment of Title VII [3] as a result of negotiations by Respondent's own duly elected bargaining agent, the Petitioner Union. Additionally, Respondent derived and accepted benefits from the plan she now challenges.

Petitioners submit that under this posture of facts the Respondent is not an aggrieved person and should be

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3. The Petitioners are aware of the cases which hold that Title VII, notwithstanding its prospective application, applies to situations where there are "present and continuing effects of past discrimination [pre-1964 discriminatory acts.]." *E.g., Griggs v. Duke Power Company*, 4th Cir., 420 F. 2d 1225, 1230 (1970), *rev'd on other grounds*, 400 U. S. 813, 95 S. Ct. 849, 28 L. Ed. 2d 158.

The above rule is highly unfair when applied to the facts of this case since at the time of the passage of the Act many organizations like these Petitioners were posited in the unenviable position of not knowing whether Congress intended Title VII to encompass retirement plans. They were left in this unpleasant limbo from the time of the passage of the Act in 1964 to 1968 when the EEOC issued its Guidelines 1604.31(a). During this interim, Petitioners were forced between the horns of dilemma. If they had proceeded to abruptly amend the retirement plan in 1964 to equalize male and female retirement ages, they faced the possibility of law suits and discontent by females who had relied on a retirement at age sixty-two. Failing to amend the plan in 1964 meant risking Title VII violations if the EEOC should later decide Congress intended the Act to apply to retirement and pension plans. Consequently, the Petitioners were truly locked into a position where there were no alternatives to avoid the hazard of law suits and employee discontent. This dilemma could have been eliminated had the EEOC taken an immediate stand on the issue of whether Title VII applied to retirement programs.

Under these circumstances, the Petitioners invite this Court, as it did the Court below, to carve out an equitable exception to the harsh general rule that Title VII applies to present and continuing effects of lawful pre-1964 activities. Such an equitable exception could be limited to situations where, as here, the unlawful present consequences of lawful pre-1964 activities are the direct and proximate result of the EEOC's failure to issue directive guidelines relative to legitimate questions anent the application and scope of Title VII.

Under the existing circumstances, a failure to carve out a needed equitable exception to the above rule would be tantamount to holding the Petitioners responsible for the results of an agency delay in issuing an administrative guideline.

precluded from attacking the plan her agent negotiated and should be deemed to have waived her rights to claim a loss as a result of the plan from which she derived and accepted benefits. To this end see Seavey, *Law of Agency* § 75 p. 127 (1964 ed.) wherein it is stated that where "a principal [such as the Respondent] invites third persons [the Petitioner Company] to deal with an agent [the Petitioner Union] on terms which will be given by the agent, he is bound by the terms as stated by the agent." Accordingly, the Respondent should be bound by the terms of the retirement plan and not permitted to complain of its alleged unlawfulness. *Cf., Singer* v. *A. Hollander & Sons, Inc.*, 3rd Cir., 202 F. 2d 55 (1953).

The failure of the Court of Appeals to treat and dispose of these troublesome contentions is surprising in view of the fact that the court intimated by its questions during oral arguments that it was bothered by the underlying equitable question of whether Respondent should be heard to complain of a retirement plan her agent negotiated and adopted long before the enactment of Title VII. To continue to leave this issue undecided is to sidestep the fundamental question of whether Respondent had cause to file suit in the instant case and to permit her to reap an unexpected windfall by the fortuitous event of the passage of the 1964 Civil Rights Act.

4. This case presents squarely the economically far-reaching issue of whether Congress intended Title VII of the Civil Rights Act of 1964 to apply to retirement and pension plans.

Research has revealed only one other recently reported decision which rules on this threshold issue. The issue was decided in *Rosen* v. *Public Service Electric & Gas Co.*, ... F. Supp. ....., 2 FEP cases 1090 (N. J. 1970); the New Jersey district court upheld the EEOC's 1968 Guideline that Congress intended Title VII to encompass retirement plans.

In holding Title VII prohibited sex differentials in retirement plans, the Court below placed great reliance on the *Rosen* case and the general principle that administrative interpretations of statutes, such as Guideline 1604.31, are entitled to great deference.

For cogent reasons not adequately considered in the New Jersey decision or the opinion below, the Petitioners submit that the conclusion reached in these two cases is erroneous and should be overturned by this Court.

First, the reliance of the Court of Appeals on the general principle that an administrative construction of a statute is entitled to special weight is inapposite to the instant case. That principle does not apply where, as here, the agency's interpretation is not based upon its own accumulated knowledge and experience and where, as here, the interpretation is neither continuous nor contemporaneous with the enactment of the statute. *E.g., Drew* v. *Lawrimore*, 257 F. Supp. 659 (S. C., 1966), *rev'd on other grounds*, 4th Cir., 380 F. 2d 479 (1967); *Hess* v. *Esperdy*, 234 F. Supp. 909 (S. D. N. Y., 1964). It certainly cannot be concluded that Guideline 1604.31 was either continuous or contemporaneous with the 1964 enactment of Title VII since it was issued almost *four years* after the passage of Title VII; nor can it be said that the Guideline was promised on the accumulated knowledge of this young agency.

In deciding whether Congress intended Title VII to apply to retirement plans containing sex differentials, it is instructive to note that none of the Act's provisions specifically prohibit such differences nor do any of the Act's provisions provide that retirement programs are within the statutory purview of Title VII.

Despite the broad language of Section 703(a) and (e) of Title VII, the distinct absence of any such provision in Title VII is strong evidence that Congress did not intend Title VII to encompass retirement programs. At the time

of Title VII's enactment, Congress was cognizant of the fact that many private retirement plans, state laws and federal retirement programs accorded different treatment to male and female employees with respect to retirement ages and benefits. It is logical to conclude that if Congress had intended to disrupt the operation of the various existing retirement programs, it would have specifically provided in its legislation that Title VII bars sex differentials in retirement plans, or at the very minimum, Congress would have indicated that Title VII generally applies to private retirement plans.

To contend that Congress intended to inferentially upset longstanding retirement plans by its enactment of Title VII is ludicrous when it is recognized that many existing federal programs contain sex differentials.[4]

A recent case on point is *Gruenwald* v. *Gardner*, 2nd Cir., 390 F. 2d 591 (1968), *cert. den.*, 393 U. S. 982 (1968). In that case the court held that there was no merit in the contention that the sex inequalities in the social security retirement benefit program violated Title VII of the Civil Rights Act of 1964.

A review of the legislative history of the Act, as reported in the 1964 U. S. Code Cong. and Adm. News, p. 2355, *et. seq.*, sheds little light on the specific issue of whether Congress intended Title VII to bar sex differentials in retirement plans. A strong indication of Congressional intent can be garnered, however, by a review of a letter from Senator Humphrey, Floor Manager of the Civil Rights Bill in 1964. Humphrey's letter, segments of which are set forth in the Prentice Hall "Pension and Profit Sharing" Report Bulletin 4, May 12, 1969, stated that "It would be a gross distortion of the provisions of Title VII to apply this language in a manner which impaired existing

4. *E.g.*, the Social Security Act, the Railroad Retirement Act, and the Federal Civil Service Act all contain provisions affording different treatment to men and women.

pension, retirement, or benefits programs." Report Bulletin 4, *supra*, also notes that Humphrey stated on the floor of the Senate "that it was 'unmistakably clear' that earlier retirement options for women could continue in operation under the Act."

Thus, in light of the available legislative history, and with the knowledge that federal retirement programs treat men and women differently, and in view of Congress' failure to specifically bar sex differentials in Title VII, it was erroneous and unreasonable for the EEOC, the *Rosen* case, and the Court below to construe Title VII to prohibit sex differentials in existing private retirement plans.

The decision below amounts to judicial legislation for it carries Title VII far beyond its Congressionally intended function and into the area of retirement plans. It is for Congress and not the Courts or the EEOC to decide whether sex differentials in retirement plans should be prohibited.

5. This Court should grant certiorari to consider two important issues of first impression. The first issue relates to whether the EEOC's *Guideline on Discrimination Because of Sex*, 29 C. F. R. 1604.31,[5] is arbitrary and capricious with the meaning of Section 706(2)(A) of the Administrative Procedure Act, 5 U. S. C. § 706(2)(A); the second issue raises the difficult question of whether the Guideline should be given retroactive effect.

The Court below completely ignored the retroactivity issue and disposed of the first issue in a very cursory fashion by holding that the Guideline was not capricious notwithstanding its built-in grace period which arbitrarily afforded some firms temporary insulation from Title VII charges.

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5. The EEOC Guideline, issued four years after the passage of Title VII, pronounced that sex differentials in retirement plans were violative of Title VII.

Petitioners submit to this Court that the Guideline represents the very zenith of arbitrariness and capriciousness. It provides that Title VII shall be applicable to charges filed before February 21, 1968 (date on which the Guideline was issued) and to charges filed after its effective date of July 1, 1968 (subsequently changed to October 1, 1968) but will be inapplicable to charges filed after February 21, 1968 and prior to October 1, 1968. EEOC Decision No. 70-45, July 18, 1969, CCH *Labor Law Reporter* ¶ 8089, supports this interpretation of the Guideline.[6]

This grace period afforded to some companies by the Guideline and not others lacks a rational basis, offends all notions of justice and equal treatment and clearly should be held arbitrary and capricious under Section 706(2)(A) of the Administrative Procedure Act. It makes no sense to hold that Section 1604.31(a) is applicable to charges filed before the date of its issuance and inapplicable to charges filed after its issuance date and prior to its effective date.[7]

In addition to the question of whether the Guideline is arbitrary and capricious, there is the equally significant issue of whether the Guideline should be applied retroactively to charges filed before the Guideline's issuance date. In failing to rule on this retroactivity issue, the

6. If Congress did intend Title VII to apply to retirement plans, then how can the EEOC constitutionally, legally or equitably insulate some companies and unions and not *all* by administrative fiat?

7. Further compounding the confusion is the fact that General Counsel issued an Opinion Letter on September 13, 1968, stating that Title VII "would permit * * * gradual adjustment" of existing retirement plans that provide for earlier optional retirement of women. How can one reconcile the Commission's position that Section 1604.31(a) definitely applies to charges before February 21, 1968, and after October 1, 1968, with the Commission's opinion letter that Title VII permits gradual adjustment of existing retirement plans? *Op. Ltr.* 9/13/68, CCH *Employment Practice Guide* ¶ 16,900.31.

Court below inferentially condoned retrospective application of the Guideline.

Petitioners vigorously urge that it is an abuse of discretion to apply Title VII to charges filed before the Guideline's issuance date, February 21, 1968.

While the EEOC Guideline does not have the binding force or effect of law, *American Newspapers Publishing Association* v. *Alexander*, 294 F. Supp. 1100, 1103 (D. D. C., 1968), it is in the nature of a new policy to the extent it officially establishes for the first time that the EEOC would apply Title VII to retirement plans which provide different optional or compulsory retirement ages for male and female employees. Prior to the Guideline, the EEOC had not established a definitive policy relative to whether Title VII applied to retirement plans.[8] *Cf., Air Transport Association of America* v. *Hernandez*, 264 F. Supp. 227, 229 (D. D. C., 1967) ("* * * no matter what its administrative nomenclature, it [a Commission interpretative Guideline] has the effect of law.").

The "first rule of construction is that legislation must be considered as addressed to the future, not to the past. * * * [and] a retrospective operation will not be given to a statute which interferes with antecedent rights * * * unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'" *Union Pac. R. Co.* v. *Laramie Stock Yards Co.*, 231 U. S. 190, 199 (1913). See also, *Greene* v. *United States*, 376 U. S.

8. The only EEOC indication which was available before the issuance of the 1968 Guideline with respect to the question of whether Title VII applied to retirement plans was the 1967 General Counsel's Opinion Letter to the effect that Title VII did not apply to the Railroad Retirement Act's disparity in retirement ages for male and female employees. (*Op. Ltr.*, February 24, 1967, LRX 2135.) Accordingly, Petitioners are arguably insulated under the authority of Section 713(b) of Title VII, 42 U. S. C. § 2000e-12(b), from any liability for the alleged unlawful retirement of Respondent.

149 (1964) (wherein the Court held that it was "unjustifiable" to give a 1960 Department of Defense regulation retroactive effect). In *Thorpe* v. *Housing Authority of Durham*, 393 U. S. 268, 280 n. 35 (1969), this Court stated "there is no reason why the principles that control legislation that affects contractual rights should not also control administrative rule making that affects contractual rights."

In determining whether an administrative ruling or finding should be given retroactive effect, the reviewing court *should test* to see whether "the practical operation of the * * * change of policy * * * [will] work hardship upon respondent altogether out of proportion to the public ends to be accomplished." *NLRB* v. *Guy F. Atkinson Co.*, 9th Cir., 195 F. 2d 141, 149 (1952). See also, *Securities and Exchange Comm.* v. *Cheney Corp.*, 332 U. S. 194 (1947); *NLRB* v. *E & B Brewing Company*, 6th Cir., 276 F. 2d 594 (1960), *cert. den.* 366 U. S. 908. The Court below failed to decide the question of whether the Guideline should be given retroactive application, and by so failing, it inferentially approved of retrospective application.

Without question, retroactive application of the Guideline works hardships on the Petitioners altogether out of proportion to the public ends to be accomplished; it gives Respondent an unexpected windfall by penalizing Petitioners for conduct they had no way of knowing was violative of Title VII. "It is this sort of thing our system of law abhors." *NLRB* v. *Guy F. Atkinson Co., supra* at 149.

Because of the sweeping financial importance of this question to the numerous firms and unions who retired employees pursuant to similar retirement plans, this Court should grant certiorari and avoid having the issue decided by inference as a result of the lower court's failure to pass upon the question.

CONCLUSION.

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A.

1. COURT OF APPEALS DECISION.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 18724 September Term 1970 — April Session 1971

ANN BARTMESS,
Plaintiff-Appellant,
v.
DREWRYS U. S. A., INC., LOCAL UNION NO. 275, INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS OF AMERICA, AFL-CIO,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

July 7, 1971

Before DUFFY, *Senior Circuit Judge*, FAIRCHILD and CUMMINGS, *Circuit Judges*.

DUFFY, *Senior Circuit Judge*. The plaintiff-appellant, Ann Bartmess, was a former non-supervisory employee of Drewrys Limited, U. S. A., Inc. (hereinafter referred to as Drewrys or Company). She was a member of defendant-appellee Union, No. 275. The Union was the exclusive bargaining agent for Drewrys' employees such as plaintiff. A retirement plan was adopted pursuant to a collective bargaining agreement negotiated by the Union and Drewrys.

The retirement plan became effective on May 1, 1955 wherein it was agreed that female employees of the Company were to retire at age 62 and male employees were to retire at age 65.

About four and a half months before plaintiff's retirement, she filed an administrative charge with the Equal Employment Opportunity Commission (EEOC). The charge alleged that the Company and the Union were committing an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964, by maintaining a retirement program which discriminated against her because of her sex.

On June 30, 1967, plaintiff passed her 62nd birthday and was retired pursuant to the terms and conditions of the retirement agreement.

On February 21, 1968, more than one year after plaintiff filed her charge with EEOC, and approximately five and a half months after her retirement, the EEOC issued guideline Section 1604.31(a) wherein it was declared that "(a) difference in optional or compulsory retirement ages based on sex violates Title VII [of the Civil Rights Act of 1964]."

Conciliatory efforts were undertaken by the parties and, being unable to reach an agreement that was satisfactory to plaintiff, the EEOC notified her on October 23, 1969 that she was entitled, on the basis of her administrative charges, to institute civil action in the District Court within a period of 30 days. Plaintiff filed this suit under Title VII of the Civil Rights Act of 1964 within that time.

Both defendants moved to dismiss the complaint on three grounds; that plaintiff's complaint was not timely filed; that the 1964 Civil Rights Act did not apply to retirement plans having different mandatory retirement ages for men and women, and that Section 1604.31 of the EEOC guidelines was arbitrary and capricious.

The District Court held the only unlawful practice charged here was the actual discharge upon retirement, and that as plaintiff had not waited until after her retirement to file her grievance, she was barred from relief. This appeal followed.

Jurisdiction.

The first issue before us is whether plaintiff invoked the administrative procedure of the 1964 Civil Rights Act in a timely manner or whether she is now barred from relief because she did not wait until the actual date of her retirement before filing a charge with the EEOC. The relevant statutory provision states:

> "A charge under subsection (a) of this section shall be filed within ninety days after the alleged unlawful employment practice occurred." 42 U. S. C. 2000e-5(d) (Title VII, Section 706(d)).

It is settled law that the ninety day limitation is no bar when a continuing practice of discrimination is being challenged rather than a single, isolated discriminatory act. *Cox* v. *United States Gypsum*, 409 F. 2d 289 (7 Cir., 1969). Appellees concede that this is the law, but argue that the only potentially unlawful practice under a retirement plan is the actual discharge and not the overall maintenance of the plan. We disagree. We have no difficulty in concluding that the actual maintenance of a discriminatory retirement plan can be one of the acts which "adversely affect [an individual's] status as an employee, because of such individual's . . . sex," and that retirement plans should be viewed as "conditions of employment" within the meaning of Section 703 of Title VII (42 U. S. C. 2000e-2(a)).

The collective bargaining agreement in force at the time plaintiff filed her charge provided that female employees must retire three years prior to their male counterparts. If

such a contract is found to be discriminatory, its mere presence in a collective bargaining agreement would render female workers "aggrieved persons" within the meaning of Title VII and would continue to do so for the entire time the individual was employed.

This Court has considered the impact of a retirement plan's terms on the employee's employment status in *Inland Steel* v. *N. L. R. B.*, 170 F. 2d 247 (7 Cir., 1948), cert. den. 336 U. S. 960. We there concluded that an employee's present interest in a plan for his retirement was sufficient to make such a plan an "other condition of employment" within the meaning of the National Labor Relations Act, even though retirement might not take place for many years. Likewise, we feel that an employee's interest in such a plan is sufficiently important to allow him or her to challenge an aspect of that plan in advance of retirement when it is believed to violate Title VII. We thus construe Title VII in harmony with the N. L. R. A. on this point.

Appellees advance a second reason why the jurisdictional provisions of Section 706 should be held to bar plaintiff's suit. Appellees argue that the only unlawful employment practice challenged in the complaint was the termination of employment, and that thus there is a fatal variance with the administrative charge, which challenged the maintenance of the discriminatory plan as well. We find no such variance to be present.

Paragraph 8 of the complaint reads in full:

> Drewrys terminated plaintiff's employment pursuant to the terms of a retirement program agreement between Drewrys and the Union, the retirement provisions of which required compulsory retirement of male employees at age 65 and compulsory retirement of female employees at age 62, by reason of which and thereby Drewrys discriminated against the plaintiff, a female person, because of her sex by maintaining a

> compulsory policy of forcing men to retire at age 65 and women to retire at age 62, and by terminating her employment by forcing her to retire after she passed her sixty-second birthday which is an unlawful employment practice in violation of Title VII, Section 703(a) of the Act (Title 42, Section 2000e-2(a)), which said unlawful practice was committed at South Bend, Indiana, within the jurisdiction of this court.

It is clear that both the "maintenance of a compulsory policy" as well as the most immediate consequence of that policy, e.g., the termination, were challenged in the complaint.

Since all of the other jurisdictional prerequisites of Section 706 are present here, we find that jurisdiction under Title VII is present.

Whether a Claim Is Stated.

We are next called upon to decide whether retirement plans containing differing treatment of men and women with respect to retirement ages violates Title VII of the 1964 Civil Rights Act. The only decision directly on point has answered this question affirmatively. *Rosen et al.* v. *Public Service Electric Company,* ..... F. Supp. ..... (D. C. N. J., 1970) (3 Employment Practices Divisions 6208) (affirmed on rehearing 3 E. P. D. 6216). We agree with the holding of the *Rosen* Court.

As mentioned heretofore, we read Title VII to include retirement plans as "conditions of employment" just as they are similarly viewed under the National Labor Relations Act. *Inland Steel Co.* v. *N. L. R. B., supra.* Title VII forbids any discrimination with respect to such conditions of employment. Furthermore, the Act proscribes classifications by employers ". . . which would tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such

individual's . . . sex . . ." Section 703(a)(2) [42 U. S. C. § 2000e-2(a)(2)]. Similar prohibitions against such classifications by labor organizations are contained in Section 703(c)(2) [42 U. S. C. § 2000e-2(c)(2)].

A plain reading of the statute indicates that retirement plans which treat men and women differently with respect to their ages of retirement are prohibited. The plaintiff here, by virtue of the plan, is forced to give up three years of work together with the money she would have earned during that period. Such a forced retirement is tantamount to a discharge. Moreover, the classification of employees on the basis of sex is, of itself, contrary to the intent of Title VII. *Rosen, supra; Sprogis* v. *United Air Lines*, ... F. 2d ..... (7 Cir., 1971—Slip opinion #18481).

In *Sprogis*, we recently noted that: "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." Defendants have come forward with no reasons why we should conclude that the language of Title VII does not mean what it says.

Instead, defendants urge that the legislative history of Title VII indicates that retirement plans were not intended to be covered when the Act was passed. We cannot agree that such an intent has been demonstrated. Defendants rely heavily on a letter written by Senator Humphrey stating his belief that retirement plans were not within the scope of the Act. But this letter was written several years after the passage of Title VII and has no bearing on the question of Congress' intent.

Congress did grant certain express exceptions to the Title VII's sex discrimination provisions, but exemption of retirement plans was not one of them. The *Rosen* Court faced the same question and, after a thorough study of the legislative history, concluded that: "[t]he debates in Con-

gress neither support nor refute Senator Humphrey's letter." We conclude that absent some strong indication of legislative intent to the contrary, we must read the words of the statute with their commonly accepted meanings. *Rosen, supra,* at ..... . We therefore hold that discrimination in retirement plans in this case violates Title VII.

We note further that the EEOC guideline on retirement plans (29 C. F. R. Section 1602.31(a)) states that "[a] difference in optional or compulsory retirement ages based on sex violates Title VII" and that such an ". . . administrative interpretation of the Act by the enforcing agency is entitled to great deference." *Griggs* v. *Duke Power Co.,* 401 U. S. 424, 434-5 (1971). This guideline is consistent with the language of the Act and we concur in it.

It does not matter for our purposes that the guideline was not drafted until after this present charge was filed. EEOC guidelines, while "entitled to great deference," do not have the force of law and cannot abrogate rights enforceable under the 1964 Civil Rights Act. *American Newspaper Publishing Association* v. *Alexander,* 294 F. Supp. 1100 (D. C. D. C. 1969).

The relevant date when those rights became enforceable was the effective date of the Civil Rights Act, not the date of the guideline. The defense of good faith reliance on a written opinion of the Commission available under Section 713 of the Act is not applicable here. See *Sprogis, supra,* (Slip Opinion, pp. 7-8).

We have reviewed appellees' contentions that this EEOC guideline is arbitrary and capricious in operation and find them to be without merit. The fact that a minimal grace period is adopted in the guideline does not mean that it works capriciously with respect to charges filed prior to that time. The guideline could not, under the law, have served to cut off claims already before the Commission.

The order appealed from is reversed, and this cause is remanded to the District Court for a trial on the merits.

Reversed and Remanded.

2. In dismissing the Respondent's complaint, the district court stated from the bench that:

> The Court doesn't know any way to read this Complaint except that it is a Complaint filed bottomed upon her alleged—upon her grievance that she was terminated because of the provisions of this retirement program.
>
> If these guidelines that were later announced had been in effect then, they might have been the subject of negotiations and a termination might never have come to pass.
>
> The Court believes that this Complaint, which alleges her employment in '44; that she continues without interruption until June 30, 1967, when she passed her 62nd birthday on which she terminated her employment, and then in the next paragraph they terminated her employment pursuant to the terms of a program, and that by terminating her employment, [57] by forcing her to retire after she passed that birthday, they—which is, she alleges, and unlawful employment act in violation of Title 7, and this Court has no hesitancy, under this interpretation of this Complaint, to hold that she has not complied timely with the notice requirements, filed her charge with the Equal Employment Opportunities Commission, as required by the Act, and, therefore, the Motions to Dismiss are each now granted. (Supp. Appendix, p. 37.)

The district court order, entered July 2, 1970, reads in relevant part:

> Hearing had on pending motions. Court hears argument of counsel. Defts' amended motions to dismiss (Summary Judgment) are each now granted.

APPENDIX B.

1. Section 2000e-2(a) and (c) of Title 42 of the United States Code provides in material part that:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * sex * * *; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's * * * sex * * *.
>
> (c) It shall be an unlawful employment practice for a labor organization—
>
> (1) to limit, segregate, or classify its membership * * * in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise affect his status as an employee * * * because of such individual's * * * sex * * *; or
>
> (2) to cause or attempt to cause an employer to discriminate against an individual in violation of this Section.

2. Section 2000e-5(a), (d) and (e) of Title 42 of the United States Code provides in material part:

> (a) Whenever it is charged in writing under oath by a person claiming to be aggrieved * * * that an employer, * * * or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, * * * or labor organization * * * with a copy of such charge and shall make an investigation of such charge, * * *. If the Commission shall determine, after such investigation, that there is rea-

sonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. * * *.

(d) A charge under Sub-section (a) of this section shall be filed within ninety days after the alleged unlawful employment practice occurred * * *.

(e) If * * * the Commission has been unable to obtain voluntary compliance with this subchapter, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, * * *.

3. Section 2000e-12(b) of Title 42 of the United States Code provides in material part:

(b) * * * no person shall be subject to any liability * * * on account of (1) the commission by such person of an unlawful employment practice if * * * the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the commission * * *.

4. Section 706(2)(A) of Title 5 of the United States Code provides in material part:

The reviewing court shall—* * * (2) hold unlawful and set aside agency action, findings and conclusions found to be

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;

APPENDIX C.

The Equal Employment Opportunity Commission's *Guidelines on Discrimination Because of Sex,* Section 1604.31(a) and (b), as amended February 21, 1968, 29 C. F. R. § 1604.31(a) and (b) provides in material part that:

> (a) A difference in * * * retirement ages based on sex violates Title VII.
>
> (b) * * * these interpretive rules * * * shall become effective immediately and shall be applicable with respect to charges presently before or hereafter filed with the Commission, except that Section 1604.31(a) will become effective July 1, 1968 [subsequently changed to October 1, 1968] with respect to charges hereafter filed with the Commission.